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No. 95-1593

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BEEBE BOURNE, d/b/a BOURNE CO.,

Petitioner,

—v.—

THE WALT DISNEY COMPANY and BUENA VISTA HOME VIDEO,

Respondents,

TOWER RECORDS, INC., BARNES & NOBLE BOOKSTORES, INC., BLOCKBUSTER ENTERTAINMENT CORP., RKO WARNER VIDEO, INC. and JOHN DOES 1 THROUGH 100,

Defendants.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF KAREN ADAMS, GRETCHEN THOMAS ANDERSON AND THE NATIONAL WRITERS UNION IN SUPPORT OF PETITIONER

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MOTION OF KAREN ADAMS, GRETCHEN THOMAS ANDERSON AND THE NATIONAL WRITERS UNION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND STATEMENT OF INTEREST

A. Karen Adams and Gretchen Thomas Anderson

Proposed amici curiæ Karen Adams and Gretchen Thomas Anderson are the daughters of the late Leigh Harline, who in the 1930s wrote the music for *Pinocchio*, the *Silly Symphonies*, and other famous songs and film scores for predecessor in interest of respondent Walt Disney Company ("Disney").[1] Mr. Harline is recognized by scholars, film critics and music historians as one of Hollywood's most influential and talented composers and a pioneer in the arts of song composition and film scoring. In 1940 Mr. Harline received academy awards from the Academy of Motion Picture Arts and Sciences for best song, "When You Wish Upon a Star," and for best score for the animated feature *Pinocchio*.

Although Disney's predecessor originally owned the copyrights to Harline's music because Harline was an employee for hire, Harline contemporaneously bargained for and obtained the right to share in various revenues from the exploitation of his music. The written agreement provided, *inter alia*, that Disney would share on a 50-50 basis with its songwriters revenues received "from its music publishers." Accordingly, the Harline heirs have shared in the royalties paid to Disney by petitioner Beebe Bourne d/b/a Bourne Co. ("Bourne"), Disney's music publisher, from Bourne's publishing and licensing of the copyrighted music to others, including Disney. However, Disney's refusal to obtain a license from and pay royalties to Bourne for the use and sale of Harline's music on subsequent video cassette recordings has deprived Harline's heirs of *any* share of the revenues from the *Pinocchio*, "Sing Along Songs" and "Simply Mad About the Mouse" videos.

The Second Circuit's use of the first sale doctrine to imply a right to sell individual copies of the music where none was concededly granted by the license, and its misapplication of

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[1] Mr. Harline also collaborated on the score and wrote much of the incidental music for *Snow White*.

the rules of interpretation of copyright licenses to find that the parties intended to license video rights to Disney back in the 1930s when video technology did not even remotely exist, have dispossessed the heirs of the creator of the music at issue of their rightful share of new revenues generated by video cassette technology, in contravention of both the intent of the parties, and the Copyright Act's constitutional mandate to benefit creators in order to further the progress of the useful arts and sciences. This decision not only creates a split in the circuits and fosters uncertainty and unpredictability in the licensing of music, literature, computer software, and other copyrightable subject matter, but also sets a dangerous precedent which severely penalizes all creators of copyrightable works. The Harline daughters respectfully move for leave to submit this brief to apprise the Court of the effect of the Second Circuit's decision upon the heirs of the creator of the music in question, and all composers, songwriters and authors similarly situated.

B. The National Writers Union

The National Writers Union ("NWU") is a labor union committed to protecting and advancing the economic rights of freelance authors in keeping with the purpose of the U.S. Copyright Act and relevant treaties. Founded in 1983, the NWU has 13 locals throughout the country and more than 4200 members who are journalists, book authors, technical writers and multimedia contributors. Its members include this country's most respected authors, all of whom make their living day after day by negotiating payment in exchange for certain rights to the works they create.

The members of the National Writers Union will be directly injured if the Second Circuit's decision in the instant case is not further addressed. It is a basic necessity of the freelance author's survival that he or she be able to license as many of the rights as possible that make up his or her copyrighted work. Rarely is payment rendered by a licensee adequate to

purchase all rights to an author's work and thus it is the tradition among authors that they negotiate each right separately, as is consistent with the divisibility of copyright. Of particular importance is the ability to ascertain the value of future rights before such rights are contemplated. NWU members must, on a daily basis, grapple with the sweeping definitions of database rights, CD-Rom rights, software adaptation rights and those rights not yet invented, and more times than not find themselves resisting flat fees offered by major publishers for all such rights. The Second circuit's decision threatens the already tenuous relationship between authors and licensees by handing licensees clear authority to profit repeatedly from a work with no additional responsibility to the author. The NWU urges the Court to review the Second Circuit's decision in keeping with the constitutional mission of protecting the livelihood of authorship.

C. Consent to File

Counsel of record obtained the consent of the petitioner, Bourne, to file this brief. Respondent Disney initially consented to the filing of this brief,[2] but only on the condition that they be furnished with a copy several days prior to the filing deadline. When counsel later informed Disney that due to time constraints it would not be possible to provide Disney with a sufficiently final draft by Disney's deadline, and requested unconditional consent, Disney refused to agree. Hence the necessity of this motion.

Based on the foregoing it is respectfully requested that the Court grant leave to file the attached brief of the Harline daughters and the National Writers Union as *amici curiae*.

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[2] At the time of the request, and subsequent refusal to consent, The National Writers Union had not yet joined in the proposed brief.

Respectfully submitted this 6th day
of May, 1996,

/s/ STEPHEN H. SULMEYER

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SUMMARY OF ARGUMENT

1. The Circuits Have Been, and Are Now Even More, Hopelessly Split on the Question of Interpretation of Copyright Licenses in New Technology Cases

Dating back to the advent of motion picture technology at the turn of the century, and continuing to the present day, the courts have been split on the question of how to interpret old copyright licenses in light of newly-discovered technologies. The decisions are divided into those which interpret grants narrowly, so as to require new bargaining for new uses, and those which interpret grants broadly, permitting the licensee to make use of the new technology without negotiating an additional license. The Second Circuit's decision adds to the split among the circuits, and compounds the problem by upsetting what had been a settled line of decisions with regard to video cassettes. The source of the split in the decisions, and the consequent unpredictability in business and litigation, lies in the insistence of the courts, including the Second Circuit, in torturing state laws of contract construction to "find" the "intent" of usually deceased parties with regard to a new technology which did not exist at the time the copyright license was entered into, and which therefore could not possibly have been within the contemplation of the parties.

2. Uniformity and Predictability Would Result if the Court Were to Clarify that Copyright Licenses Are to be Construed in a Manner Which Furthers the Policies and Purposes of the Copyright Law.

The Second Circuit's decision demonstrates that clarification is needed to ensure that copyright licenses are consistently interpreted, and state laws of contract construction uniformly applied, in light of the federal purposes of the copyright law. With the advancing pace of technological change and the advent of multimedia and the "Information Superhighway," this need is particularly acute. Because there is usually no "intent" to be "found" as an issue of fact, the

courts, in the exercise of their equitable powers, should presume that rights to an unforeseen technology remain with the copyright owner, and doubts should be resolved in favor of providing additional financial incentives to copyright owners, in keeping with the policies and purposes of the copyright law.

3. The Second Circuit's Failure to Interpret the Copyright License at Issue in Light of the Federal Policies and Purposes Underlying Copyright Law Resulted in Multiple Errors, Which Have Caused Substantial Harm to These Amici, and Will Harm Others Similarly Situated.

The Second Circuit misapplied the rules of copyright license construction and the first sale doctrine by placing inordinate weight upon its mistaken belief that "the Compositions at issue here were created by Disney." 68 F.3d at 632. Disney *originally owned the copyrights by operation of law as an employer for hire*—but it was never the *creator* of the music. Disney did *not* create the compositions. Amici's father did. By placing undue emphasis on the fact that Bourne obtained the copyrights from Disney, and mistakenly concluding from this fact that "[Bourne] has [already] received [its] reward," 68 F.3d at 632, the Second Circuit blinded itself to the broader implications of its decision for the vastly more common situation where the copyright owner/licensor obtained the copyrights from someone *other* than the non-exclusive licensee. As a matter of law, Disney is not entitled to preferential treatment simply because Bourne obtained the copyrights from Disney. Bourne obtained "all rights" in and to the music, including the copyrights, while Disney received only limited rights to use the music in its films and to publicly perform those films. Not only does the Second Circuit's decision set a dangerous precedent which allows judges to use the first sale doctrine to re-write copyright licenses, but by requiring the copyright owner to "unambiguously" reserve all rights to uninvented technologies, it

also dispossesses the heirs of the creator of the *music in question* of their right to benefit from the fruits of their father's creative labors. If the Second Circuit's decision is permitted to stand, authors, composers, software writers and others will lose a major incentive to create copyrightable works: the right to receive a share of revenues generated by new, unforeseen technologies—to the detriment of the public welfare and the progress of the useful arts and sciences.

I.

THE CIRCUITS HAVE BEEN, AND ARE NOW EVEN MORE, HOPELESSLY SPLIT ON THE QUESTION OF INTERPRETATION OF COPYRIGHT LICENSES IN NEW TECHNOLOGY CASES

A. Courts Are Split Between Broad and Narrow Constructions.

In order to understand the broader implications of the Second Circuit's decision—that a 1939 license of the right to synchronize music in "motion pictures" arguably included the right to copy the music onto and to sell video cassettes—this decision must be viewed in the wider context of so-called "new technology" cases. Since the advent of motion picture technology around the turn of the twentieth century, and continuing at an ever-increasing pace to the present day, courts have been faced with the question of whether rights in unforeseen, newly-invented technologies were granted along with the rights to already existing media.[1] Professor Nimmer has

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[1] Courts treat unknown, future technologies differently from existing media which are simply not mentioned in a copyright license. *E.g.*, *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150 (2d Cir.), *cert. denied*, 393 U.S. 826 (1968). In the case of existing but omitted technologies, the parties can reasonably be presumed to have considered the issue of the allocation of rights to the omitted medium. In the case of unforeseen media, however, no such presumption can reasonably be made. *See* P. Goldstein, COPYRIGHT § 4.6.3.2 at 4:107-108 (2d ed. 1995)

stated that these cases "present no clear pattern of decision,"[2] and divided new technology cases into those which limit the grant to the "unambiguous core meaning" of the media granted, and those which find new uses as "reasonably" falling within the "ambiguous penumbra" of such media, and hence included within the grant.[3] Whatever the merits of this

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(hereinafter *Goldstein*). The instant case deals only with unforeseen technologies.

[2] 3 M. Nimmer, NIMMER ON COPYRIGHT § 10.10[B] at 10-89 (1996) (hereinafter *Nimmer*).

[3] 3 *Nimmer* § 10.10[B]. *Compare Frohman v. Fitch*, 164 App.Div. 231, 149 N.Y.Supp. 633 (1914) (grant of stage rights held to include motion picture rights) *with Klein v. Beach*, 232 F. 240 (S.D.N.Y. 1916), *affirmed*, 239 F. 108 (2d Cir. 1917) (grant of stage rights did not include motion picture rights); *L.C. Page & Co. v. Fox Film Corp*, 83 F.2d 196 (2d Cir. 1936) (grant of motion picture rights included right to make "talkies") *with Kirk La Shelle Co. v. Paul Armstrong Co.*, 263 N.Y. 79, 188 N.E. 163 (1933) (grant of motion picture rights did not include right to make "talkies"); *Wexley v. KTTV, Inc.*, 108 F.Supp. 558 (S.D. Cal. 1952), *affirmed*, 220 F.2d 438 (9th Cir. 1954) (grant of motion picture rights included television rights) *with Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956) (grant of motion picture rights did not include television rights); *Rooney v. Columbia Pictures Industries, Inc.*, 538 F.Supp. 211 (S.D.N.Y.), *affirmed*, 714 F.2d 117 (2d Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983) (grant of right to distribute motion pictures "by any present or future methods or means" or "any other means now known or unknown" included video cassette rights) *with Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 1993 U.S. App. LEXIS 4068 (9th Cir. 1993) (unpublished decision), *vacated in part*, 24 F.3d 1088 (9th Cir. 1994) (grant of motion picture distribution rights by means of exhibition in theaters, on television, "and by any other technological, mechanical or electronic means, method or device now known or hereafter conceived or created" did not include video cassette rights); *Cohen v. Paramount Pictures Corp.*, 845 F.2d 851 (9th Cir. 1988) (grant of motion picture and television rights did not include video cassette rights) with *Bourne v. Walt Disney Co.*, 68 F.3d 621 (2d Cir. 1995) (grant of motion picture rights included video cassette rights).

distinction,[4] the courts have neither created nor followed any meaningful or predictable rule as to when a given license should fall into one category or the other.[5] The one area that appeared to have some modicum of uniformity was the situation involving video cassettes, wherein the courts generally held that video cassette rights were not encompassed by a grant of motion picture or television rights made prior to the invention of video technology.[6] It was this one island of predictability in a wide ocean of uncertainty that was upset by the Second Circuit in the instant case.

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[4] Although Nimmer describes the latter approach as "preferred," this is not borne out by the cases, and has been the subject of repeated critical attack. *E.g.*, *Goldstein*, § 4.6.3.2 at 4:111-112 ("[t]he problem with this interpretational approach is that it pivots on the question-begging term, 'reasonably.' 'Reasonably,' if it is to mean anything, must have some external referent—either the parties' actual intentions . . . or some objective signpost. . . . Absent either referent, the term is little more than an *ipse dixit* that offers no guidance to parties in planning their transactions or, years later, in evaluating the merits of litigation").

[5] One observer, writing in 1954, stated that "the courts have not yet evolved a sound principle for dealing with the problems arising from new uses, nor even a reliable rule . . . ." M. Cohn, *Old Licenses and New Uses*, 19 Law & Contemp. Prob. 184, 184 (1954). The situation had not improved as of 1995, when another writer explained that "it is clear that courts' opinions are divergent and leave those charged with the responsibility of drafting license agreements with no clear indication of how any individual agreement will be interpreted." J. Nakos, *An Analysis of the Effect of New Technology on the Rights Conveyed by Copyright License Agreements*, 25 Cumb. L. Rev. 433, 455 (1995).

[6] *E.g.*, *Cohen v. Paramount Pictures Corp.*, 845 F.2d 851, 853-55 (9th Cir.1988); *Rey v. Lafferty*, 990 F.2d 1379, 1387-91 (1st Cir.), *cert. denied*, 114 S.Ct. 94 (1993); *Bloom v. Hearst Entertainment, Inc.*, 33 F.3d 518, 524-25 (5th Cir. 1994); *Tele-Pac, Inc. v. Grainger*, 168 App.Div.2d 11, 570 N.Y.Supp.2d 521, *appeal dismissed*, 79 N.Y.2d 822, 580 N.Y.Supp.2d 201 (1991).

B. The Reason for the Split is the Quixotic Quest to Ascertain Dead Parties' "Intent."

The principal reason for the confusion (and concomitant lack of predictability) has been the courts' insistence on "finding" the parties' "intent" with regard to the unforeseeable technology in the language of the instrument in question, and/or through the admission of extrinsic evidence.[7] As Professor Nimmer explained:

> More often in fact there is no such single intent. Either each party had a different intent with respect to the disputed issue of scope, or more likely, there simply was no intent at all at the time of execution with respect to this issue insofar as it relates to whether the grant includes a new use developed at a later time. The very fact that we are most often dealing with a later developed technological process (even if it were known in some form at the time of execution) suggests that the parties' ambiguous phraseology masks an absence of intent rather than a hidden intent that the court simply must 'find.'

3 *Nimmer* § 10.10[B] at 10-91 - 10-92. As another commentator has noted, in the case of new technologies, because the new medium in question did not exist at the time of contracting, "there were no . . . rights to those [new] uses for which the parties should have negotiated." Nakos, *Effect of New Technology*, *supra* note 5, at 437. Consequently, any search for the parties' "intent" with regard to such unforeseen uses can only be an exercise in futility and a cause of confusion. *See Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d

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[7] *E.g.*, *Barris Indus., Inc. v. Worldvision Enter., Inc.*, 875 F.2d 1446, 1449 (9th Cir. 1989). Another, albeit less widespread, reason for the lack of coherence in the decisions has been the attempts of some courts to develop "specialized rule of construction" for new technology cases. *See* 3 *Nimmer* § 10.08 at 10-72 n.7; *see also* Professor Goldstein's analysis of the *Bartsch* case, which he describes as "an example of a failed attempt to craft special rules for new media cases." *Goldstein* § 4.6.3.2 at 4:111.

150, 155 (2d Cir. 1968), *cert. denied*, 393 U.S. 826 (1968) ("[w]ith Bartsch dead, his grantors apparently so, and the Warner Brothers lawyer understandably having no recollection of the negotiation, any effort to reconstruct what the parties actually intended nearly forty years ago is doomed to failure"); *Rey v. Lafferty*, 990 F.2d 1379, 1387 (1st Cir. 1993), *cert. denied*, 114 S.Ct. 94 (1993) (because video technology was not in existence at time license was granted, "it must be inferred that the parties did not specifically contemplate" whether video rights were included in rights granted); *see also* 2 E. Farnsworth, FARNSWORTH ON CONTRACTS § 7.15 (2d ed. 1990).

C. Clarification Is Needed.

In the absence of a clear decision from this Court, the appellate courts have floundered in their attempts to address ownership of rights in new technologies, leaving trial courts, copyright owners, licensees, and the negotiators of new copyright licenses without any predictability or guidance whatsoever with regard to the inclusion or exclusion of newly-developed means of exploitation in copyright licenses, and permitting results which frequently frustrate the very purpose upon which the copyright laws are predicated. Nowhere are the negative effects of this sad state of affairs more apparent than in the instant case. The manifest need for clarification from this Court will only be exacerbated by the emergence of the multimedia industry which, with its singular ability to exploit existing works in previously unforeseeable ways, has a pronounced need to gain access to the copyrights in such works. The time for clarification by this Court is now.

II.

UNIFORMITY AND PREDICTABILITY WOULD RESULT IF THE COURT WERE TO CLARIFY THAT COPYRIGHT LICENSES ARE TO BE CONSTRUED IN A MANNER WHICH FURTHERS THE POLICIES AND PURPOSES OF THE COPYRIGHT LAW

A. The Problem is Not One of Contract Interpretation.

The Second Circuit's aberrant decision, particularly when viewed in historical context, underscores the need for uniform guidelines for the interpretation of copyright licenses. The first step in formulating a uniform approach to the "new technologies" cases is to recognize that the "problem" is fundamentally *not* one of contract interpretation. As one astute observer noted over 40 years ago:

> The 'new use' problem is essentially not one of construction at all, and it should be so recognized and dealt with. The problem is created, not by the cupidity or contrariness of the parties, nor by the ambiguity of language, but by the advent of an unforeseen circumstance freighted with important economic significance. . . . [¶] [T]he terms of a licensing agreement cannot often furnish a clue to the solution of the problems raised by a new use. By definition the new use was not known when the instrument was drawn, and unless general terms are employed in the agreement the new use cannot have been within the contemplation of the parties. To attribute a meaning, unknown and unknowable to the parties, to the words they wrote in an agreement is indeed to revert to animism and to act as though ink and paper could bring about results independent of the purpose of the parties. . . . [¶] The question is no longer one of express contract. It is a question whether a court in the exercise of equitable discretion should exact new obligations and impose new duties.

M. Cohn, *Old Licenses and New Uses*, *supra* note 5, at 199-200. The Second Circuit failed to recognize that, where the original parties are dead and the technology at issue did not exist when the license was granted, it is foolhardy to frame the case as a factual question of the parties' intent. Judges, sitting as courts of equity, can best provide for uniform application of federal copyright policy under such circumstances.[8] *See ABKCO Music, Inc. v. Westminster Music, Ltd.*, 838 F. Supp. 153 (S.D.N.Y. 1993); *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150 (2d Cir.), *cert. denied*, 393 U.S. 826 (1968).

B. The Goal of Copyright License Construction, to Effectuate the Purposes of the Copyright Act, Can Best be Achieved by a Presumption that Rights Not Expressly Granted are Retained by the Copyright Owner.

Several courts have adopted the principles that, in new technology cases (at least where the original parties are unavailable), courts are required to exercise their equitable powers, rather than their fact-finding powers or those of the jury; that judges should presume that all rights not expressly granted in a copyright license are retained by the grantor; and that all ambiguities are to be resolved in favor of the grantor.[9]

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[8] For many of the reasons discussed recently by the Court in *Markman v. Westview Instruments, Inc.*, ___ U.S. ___, 96 Daily Journal D.A.R. 4642 (April 23, 1996), including their expertise in exegesis and familiarity with copyright law and policy, judges rather than juries are in a far better position to construe the meaning of copyright licenses in such cases.

[9] *E.g.*, *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 491 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956); *Warner Bros. Pictures, Inc. v. CBS, Inc.*, 216 F.2d 945 (9th Cir. 1954), *cert. denied*, 348 U.S. 971 (1955); *Electronic Publishing Co. v. Zalytron Tube Corp.*, 151 U.S.P.Q. 613 (S.D.N.Y. 1966), *affirmed*, 376 F.2d 592 (2d Cir. 1967); *see* 3 *Nimmer* § 10.08 at 10-72; *see also Rey v. Lafferty*, 990 F.2d 1379 (1st Cir.), *cert. denied*, 114 S.Ct. 94 (1993); *Interstate Hotel Co. v. Remic Music Corp.*, 157 F.2d 744 (8th Cir. 1946).

These principles follow from the proposition that copyright licenses must be construed in accordance with the purposes underlying federal copyright law. *E.g., S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1088 (9th Cir. 1989); *Cohen, supra*, 845 F.2d at 854.[10] As this Court has made clear on numerous occasions, the chief purpose of the Copyright Act is to promote the public welfare through the encouragement of artistic and literary creation by means of the grant of exclusive rights, and concomitant financial rewards, to authors and artists. As the Court explained in *Mazer v. Stein*, 347 U.S. 201, 219, 74 S. Ct. 460, 98 L. Ed. 630 (1954):

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance the public welfare through the talents of authors and inventors in science and useful arts.

Implementation of this "economic philosophy" must be the primary goal of all courts which attempt to interpret copyright licenses.

The panel majority's holding, particularly its tortured stretching of the first sale doctrine beyond the breaking point, ignores the teaching of *Mazer* and similar precedent, and significantly threatens the personal incentives by which Congress and the Framers intended to promote the public good. By granting the entirety of an unforeseen financial windfall solely to Disney, a non-exclusive licensee, the Second Circuit has provided a substantial disincentive to creators

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[10] These courts have held in effect that, while contract interpretation is a matter of state law, when the contract at issue is a copyright license the state rules of contract construction must be read through the veneer of the purposes underlying the federal Copyright Act. *E.g., S.O.S., supra*, 886 F.2d at 1088 ("we rely on state law to provide the canons of contractual construction, but only to the extent such rules do not interfere with federal copyright law or policy").

of new artistic works. *See* Nakos, *supra*, note 5, 25 Cumb. L. Rev. at 455 ("[i]f the rights to a new use are awarded to the licensee, the incentive to engage in creative pursuits may be thwarted").

It is entirely proper and certainly preferable for a court of equity to interpret copyright licenses in a manner that results in a just and fair sharing of new revenues generated by new technologies, and which thereby furthers the primary policy underlying copyright law. *See ABKCO Music, Inc. v. Westminster Music, Ltd.*, 838 F. Supp. 153, 156 (S.D.N.Y. 1993) ("the allocation of the risks and rewards of unforeseen 'new uses' to one party or another becomes an issue of policy which it is the responsibility of the courts to decide"); Cohn, *supra* note 5, 19 Law & Contemp. Prob. at 200 (a new use "is a source of revenue which is a windfall to both author and licensee, and no injustice appears in requiring that it be shared"). As a matter of equity and fairness, "the original licensee could not have bargained for, or paid for, the rights associated with video-cassette reproduction," and therefore "[t]he holder of the license should not . . . 'reap the entire windfall' associated with the new medium." *Cohen, supra*, 845 F.2d at 854. A presumption that the rights to new uses reside with the grantor accomplishes an equitable sharing of new revenues because, as a practical matter, the licensee is generally in the best position to exploit the work in the new medium, and the copyright owner and licensee will negotiate a new license fee in an amount that will ensure that both sides profit.[11]

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[11] Such a policy of ensuring that authors share in revenues generated by new technologies parallels the Congressional policy behind the Copyright Act's compulsory termination-of-transfers provision, 17 U.S.C. § 203, which intends that authors share in revenues from works the financial success of which could not have been anticipated at the time of the original transfer.

C. Such a Presumption Also Comports With Traditional Canons of Contract Construction.

In addition to furthering the purposes of copyright and promoting equity, such a presumption also comports with traditional canons of contract construction. The ancient maxim *expressio unius est exclusio alterius* suggests that all rights not expressly granted in a contract are reserved. This presumption is further validated by the venerable rule of contract construction which holds that, where two parties to a contract attach different meanings to a disputed term, there is no mutual assent, and no contract is formed—and hence disputed rights in an ambiguously referenced medium could not have been granted. *See* J. Calamari & J. Perillo, CONTRACTS § 3.12 (3d ed. 1987). The implied covenant of good faith and fair dealing, which implies into all contracts the requirement that neither party shall do anything to deprive the other of the fruits of the bargain, further supports a canon of copyright license construction which results in an equitable sharing of unforeseen revenues. To the extent traditional principles of contract interpretation favor the party with less bargaining power or business experience, it is generally the licensee who has the superior bargaining strength, as well as the expertise and experience in exploiting works in various media, and thus the ability to predict what uses might arise for a given work in the future. *See* Nakos, *supra* note 5, 25 Cumb. L. Rev. at 446. This, too, supports the presumption that rights to unenumerated future technologies remain with the copyright owner.

To conclude, the action by this Court which would best effectuate the constitutional and congressional purposes underlying the copyright laws; which accords with principles of equity and fairness; which most closely follows traditional canons of contract construction; and which would bring a measure of predictability and consistency to "new technology" cases which involve the interpretation of copyright licenses, would be to clarify and enforce the presumption that

all uses or media not in existence at the time of execution of the license are retained by the copyright owner.[12]

III.

THE SECOND CIRCUIT'S FAILURE TO INTERPRET THE COPYRIGHT LICENSE AT ISSUE IN LIGHT OF THE FEDERAL POLICIES AND PURPOSES UNDERLYING COPYRIGHT LAW RESULTED IN MULTIPLE ERRORS, WHICH HAVE CAUSED SUBSTANTIAL HARM TO THESE AMICI, AND WILL HARM OTHERS SIMILARLY SITUATED

A. Amici's Father, Not Disney, Created the Music in Question.

The Second Circuit's misapplication of the rules of copyright license construction and the first sale doctrine can be traced to the inordinate weight which it placed upon its mistaken belief that "the Compositions at issue here were created by Disney." 68 F.3d at 632. Disney *originally owned the copyrights by operation of law as an employer for hire*—but it did *not* create the compositions. Amici's father did. Even as an employee for hire (and the beneficiary under a royalties agreement), Harline was an artist whose creative efforts were meant to be encouraged by the Copyright Act.[13] By reading

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[12] It should further be clarified that all doubts should be resolved in favor of providing additional financial incentives to copyright owners, in keeping with the policies and purposes of the copyright law. *See* Nakos, *supra* note 5, 25 Cumb. L. Rev. at 454-55.

[13] Even though the music was created by Leigh Harline as an employee for hire, the policy arguments made above still apply. Although employers for hire should be adequately compensated to ensure that they are encouraged to hire creative people who will create works of art and thus further the Constitutionally mandated purposes of the Copyright Act, employees for hire who create copyrightable works must also be adequately compensated to ensure that they are willing to accept employ-

the 1930s agreements and the Copyright Act so as to give Disney the video rights to "its own songs," rather than applying the equitable rules of construction discussed above, the Second Circuit frustrated the purposes of the copyright law and granted the entire video windfall exclusively to Disney.[14] In so doing, the Second Circuit dispossessed amici of their rightful share of the video revenues from the *Pinocchio* and other video recordings of their father's music, and set a dangerous precedent which serves as a substantial disincentive to all potential artists and other creators of copyrightable works, in frustration of the fundamental purpose of the Copyright Act to encourage such creators.[15]

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ment with companies like Disney and create copyrightable works, rather than accept more lucrative employment in other, non-creative sectors.

[14] The Second Circuit's ruling has the effect of undervaluing the contributions of songwriters and other artists, as can be seen by the court's effective granting of a royalty-free license for the "Sing Along Songs" and "Simply Mad About the Mouse" videos, which contain no plot and little of the original animation, and which owe their success and even their existence to the musical contributions of Leigh Harline, whose heirs are receiving nothing from the sales thereof.

[15] The Second Circuit places an untenable burden on copyright owner/licensors when it states that the issue in future technology cases is whether the license "unambiguously excludes" the new technology from the grant of rights. 68 F.3d at 629. Several other circuit courts of appeal which have considered the question have correctly reached the opposite conclusion: that the policy and purposes underlying the Copyright Act require that copyright licenses be construed to *grant* rights to new technologies *only* when they do so unambiguously. *See Cohen, supra*, 845 F.2d at 854; *Ettore, supra*, 229 F.2d at 491. New technologies, like the Copyright Act's termination of transfers provision, create the opportunity for authors, composers, artists and computer software writers to negotiate new licenses and obtain fresh financial rewards for their artistic labors, thus providing the very incentive which is at the core of the Copyright Act. The Second Circuit's decision emasculates this incentive. Moreover, in the case of unforeseen technologies, "[t]here is no way to have the knowledge to exclude the use when drafting the contract," Nakos, *supra* note 5, at 440, and hence it is totally unfair to put the burden on Bourne or any copyright owner to "unambiguously exclude" an unknown technology.

B. The Assignment to Bourne was Broad, the License to Disney was Narrow, And Bourne Retained the Right to Reproduce the Music by All "Other Devices" Than [illegible]n.

By placing undue emphasis on the fact that Bourne obtained the copyrights from Disney, and mistakenly concluding from this fact that "[Bourne] has [already] received [its] reward," 68 F.3d at 632, the Second Circuit ignored the fact that Disney's assignment to Bourne was extremely broad and complete, while Bourne's license back to Disney was limited to specifically enumerated rights. Thus in paragraph 2 of the *Pinocchio* agreement (JAX 888-96) Disney unambiguously granted to Bourne's predecessor "all rights" in the music from *Pinocchio*:

> You agree to and do hereby convey to us all of the 'music' hereby affected and *all rights therein* throughout the world, including but not limited to the right to copyright the same in our name in the United States of America and throughout the world and the right to all renewals and extensions of copyright *for us to have and to hold the same absolutely and forever.* [Emphasis supplied.]

In contrast to paragraph 2's broad assignment of "all rights" in the music to Bourne, paragraph 3 of the *Pinocchio* agreement constituted a license back to Disney of limited, specifically-enumerated rights: the right to synchronize the music with Disney's "motion pictures" and to give public performances of those motion pictures (Pet. App. 99a).[16]

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[16] As consideration for the conveyance, Bourne agreed to pay Disney one-half of the revenues generated by Bourne's publication and licensing of the music (paragraph 5, Pet. App. 99a-100a). Thus the only "reward" which Bourne could receive was from the generation of license fees—which in the case of video cassettes amounted to one-half of nothing.

The grant of "all rights" in the music to Bourne, and a concurrent license back to Disney of limited rights, while not specifically addressing video rights, nevertheless reveals a *general* intent that the rights licensed to Disney should be construed narrowly. *See Rey v. Lafferty, supra*, 990 F.2d at 1387 (limited license of television rights appeared "to contemplate a comparatively limited and particular grant of rights," and hence supported holding that video rights were not included in grant of television rights); *see also ABKCO Music, supra*, 538 F. Supp. at 226-28. Thus, even when an intent-based approach is used, the circumstances and totality of the *Pinocchio* agreement indicate a mutual intention for Disney to have the limited and strictly circumscribed right only to use the music in *public performances* of its "motion pictures,"[17] and for Bourne to retain all other rights "for mechanical reproduction" of the music

> in the form of player rolls, including word rolls, records, discs, electrical transcriptions or synchronization in motion pictures, *or other devices for the mechanical reproduction of the said musical composition*[s] . . . .

Pinocchio agreement ¶ 5(b) (Pet. App. 100a) (emphasis supplied). This further supports the conclusion that the Second Circuit, in exercising its equitable powers to construe the agreement, should have found that video rights were among "all" the rights granted to Bourne, and not licensed back to Disney.[18]

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[17] The term "motion picture" referred in pre-television days exclusively to celluloid film projected onto screens in public theaters. *See Ettore, supra*, 229 F.2d at 488 ("[o]rdinarily a motion picture film is projected by a projector by rays of light cast on a screen. There is no direct interposition of electrical energy").

[18] It makes no difference that the music at issue was originally created by Disney employees for use in Disney motion pictures such as *Pinocchio*. Once Disney assigned the compositions to Bourne, and obtained a limited license to use the compositions in synchronization with its films, its position was no different than if it had simply obtained a standard synchronization license to use unrelated popular compositions

C. The Second Circuit's "Intent"-Based Approach to the New Technologies Question Led Inexorably to its Clearly Erroneous Distortion of the First Sale Docrine, Demonstrating *Reductio ad Absurdum* the Impropriety of This Approach.

The first sale doctrine, now codified at 17 U.S.C. § 109, is a judicially-created doctrine which was developed to limit the extent of the copyright monopoly. As Professor Nimmer has explained, the *raison d'être* of the doctrine, which limits the copyright owner's right to control distribution of individual copies of copyrighted works after title to such copies has passed to another, is that, once title has passed, "at this point, the policy favoring a copyright monopoly for authors gives way to the policy opposing restraints of trade and restraints on alienation." 2 *Nimmer* § 8.12[B] at 8-140.3. Thus, "once the copyright owner consents to the sale of particular copies or phonorecords of his work, he may not thereafter exercise the distribution right with respect to such copies or phonorecords." *Id.* at 8-140.4. The doctrine was therefore intended to ensure that the copyright owner could only exercise the right of distribution (or the right to sell individual copies) with respect to the initial sale of a copy of a copyrighted work, and could not control or restrict the resale or other further transfer or possession of such a copy. *Id.* at 8-140.5. The doctrine was never intended to act as a tool to permit judges to re-write copyright licenses, as the Second Circuit has done.

Amici will not repeat petitioner's arguments with regard to the Second Circuit's treatment of the first sale doctrine. How-

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in its motion pictures, as was done in such films as *American Graffiti*, *Bonnie & Clyde*, *Forrest Gump*, and many others. *See Gross v. Seligman*, 212 F. 930 (2d Cir. 1914). Such a license to use copyrighted musical compositions in synchronization with motion pictures does not include the right to synchronize such compositions with magnetic video tape images, nor the right to sell cassettes containing such video and audio information to the public for private home viewing. *See Cohen, supra*, 845 F.2d at 854-55; *Rey, supra*, 990 F.2d at 1390-91.

ever, two points derserve emphasis. First, as petitioner correctly points out, Disney had no right to distribute the *Pinocchio* and other video cassettes at issue because there was no *sale*, and hence no transfer of title, of such video cassettes from Bourne to Disney. Nimmer explains that "[m]ere authorized possession of a copy, if title in the tangible copy does not pass to the possessor, will not trigger the limitation of Section 109(a), and hence, will not affect the copyright owner's rights under Section 106(3)." *Id.* at 8-140.6.

Second, the court erroneously relied on its own precedent in *Platt & Munk Co. v. Republic Graphics, Inc.*, 315 F.2d 847 (2d Cir. 1963), when it held that the purposes of the doctrine had been satisfied in this case because Bourne had already 'received her reward.' This is truly nonsensical, because the "reward" to which the Second Circuit had made reference in *Platt & Munk* was the "reward" associated with the "first sale" of the particular copy in question. 315 F.2d at 854. In *Platt* there had been no actual "sale" because the defendant had manufactured the copies in question for plaintiff, then resold them pursuant to the New York Personal Property Law when plaintiff refused to pay for them, without ever taking actual title to the goods from the plaintiff. The Second Circuit held that the copyright owner could be deemed to have received a "reward" in the form of debt relief which was the equivalent to the "reward" which it would have obtained had it sold the copies at issue. *Id. Platt & Munk* therefore stands for the proposition that, under certain circumstances, even where there is not a literal "sale," one lawfully acquiring possession of a copy of a copyrighted work may nevertheless claim the benefits of the first sale doctrine provided the copyright owner received some kind of monetary reward or its equivalent in exchange for parting with the copy.

Here, Bourne received no "reward" at all with regard to the video cassettes containing Harline's music, because Disney simply made them and sold them without any consideration whatsoever to Bourne (or to Harline's heirs). Nimmer makes

clear that, assuming (as the Second Circuit did) that a defendant has the contractual right to *reproduce* copies (and hence came into lawful possession of such copies), but does *not* have the contractual right to *distribute* such copies (as Disney conceded it did not), the contract governs, and such a defendant may be held liable as an infringer for distributing such copies. 2 *Nimmer* § 8.12[B] at 8-146-47. The Second Circuit's reading of the first sale doctrine thus simply frustrates the central purpose of copyright: to permit authors to have for a limited time the exclusive right to their writings.

A grant of rights to *make* video cassettes, but not to *sell* them, as the Second Circuit correctly pointed out, would be worthless. But rather than making the intellectually indefensible leap to imply the right to sell by means of the first sale doctrine, the court should have realized that this result only confirms that the parties could *not* have intended to license video cassette rights in their 1939 license. The court's misapplication of the first sale doctrine demonstrates *reductio ad absurdum* the impropriety of the "intent"-based approach it took to this case. If the Second Circuit's construction of the first sale doctrine is permitted to stand, it will undermine the expectations of parties to copyright licenses in all media by permitting judges to arbitrarily re-write such licenses, and frustrate the intention of Congress when it enacted Section 109. Its decision must be reversed.

CONCLUSION

The Second Circuit's decision creates a split in the circuits, and casts into disarray what had been a clear rule of copyright license construction: that absent an explicit grant, or a clear future technologies clause, video rights remain with the copyright owner/licensor where video technology did not exist at the time of execution of the license. The Second Circuit's damage to predictability in this area is further compounded by the court's misapplication of the first sale doctrine to imply

a right to *sell* recordings of the copyrighted music where no such right had concededly been granted by the license. The net result of the decision below has been to substantially increase the level of uncertainty in an already confused area of the law, and to undermine the fundamental purpose of the copyright laws to promote the public welfare by encouraging the creation of works of authorship. Given the dangerous and manifestly incorrect precedent set by the Second Circuit, the glaring split in the circuits, and the inability of the lower courts after nearly a hundred years of trying to establish a uniform rule for interpreting copyright licenses in new technology cases, *amici curiae* respectfully submit that this is an appropriate case in which to grant a writ of certiorari and settle this problem once and for all.

Respectfully submitted,

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